

VI. THE MORNING OF MAY 13, 1985

Execution of the planned confrontation with MOVE actually began the day before. By the morning of May 13th, the Police Department had assembled hundreds of weapons and various kinds of explosives to assault the compound. In the first few hours of the battle between MOVE and the police, thousands of rounds of ammunition were fired and high-powered explosives were detonated. This section reviews the events of the morning, including the preparations for the assault, and discusses the propriety of the force used.

Many of the police and firemen involved in the May 13, 1985 operation were required to report for duty hours in advance of Sambor's early morning ultimatum to MOVE members. As a result, many of the men in the most demanding situations as the operation progressed had the smallest reserve of physical resources on which to draw.

Lieutenant Dominic Marandola's situation is illustrative. Marandola was ultimately responsible for controlling the police return gunfire during the morning gun battle. He had reported for duty at Stake Out Headquarters sometime between 9:30 and 10:00 p.m. on Sunday evening, May 12th. From there he proceeded to the Geriatric Center at about midnight. At that location he first met with Sambor, Captain Kirchner, Lieutenant Powell and Sergeant Connor, among others. Next, he attended a large meeting

with all command personnel who would be present on the scene. He then waited for the operation to begin.

Like Marandola, the vast majority, if not all, of the Police Department command personnel and supervisors were on duty long before the operation actually began. Sergeant Donald Griffiths, for example, was required to report to Stake Out Headquarters at 10:00 p.m. on Sunday evening. There he met Marandola, Kirchner and Inspector Tiers, and was briefed for the first time about his role in the operation. Similarly, Officer John LaCon, a Stake Out officer who manned one of the surrounding posts the next day, reported for duty before 11:00 p.m. The information disseminated at the briefing which he attended after reporting was vague concerning who was in the MOVE house; he was told, however, to expect "anything" during the confrontation.

Similar instructions were given to the men assigned to the insertion teams. Team members reported for duty as early as 10:00 p.m. on Sunday evening. Before proceeding to the operations area at about 2:00 a.m., they participated in briefings and witnessed a demonstration of the "flash-bang" explosives they would use to disorient MOVE combatants.

As a consequence of the reporting demands and the decision not to brief key police personnel earlier, many men were on duty for nearly eight hours before the operation even began. Moreover, many officers had been on duty for almost 24 hours -- and without sleep for many hours more -- when they were confronted with the back alley inferno. Better planning and organization could have

avoided such extreme mental and physical demands on participating officers.

The specifics of the plan which police sought to implement on the morning of May 13th have already been extensively discussed in Part III of this report. In brief summary, if MOVE declined to permit peaceful service of the arrest and search warrants which had been obtained, the first step was to activate the Fire Department's squirt hoses. Their purpose was to direct water onto the compound's roof to minimize or eliminate the bunker's strategic advantage. At the same time, the two insertion teams would proceed, under cover of smoke and tear gas, into the two properties adjoining the MOVE compound, 6219 and 6223 Osage Avenue. Once inside these houses, the teams were to make three-inch holes in the basement and second floor party walls. Through these holes tear gas would be inserted into 6221 using pepper foggers. This insertion of gas into 6221's lowest and highest floors was intended to first drive its occupants to the first floor and then cause their surrender.

In early May, 1985, this Police Department plan was reviewed by FBI Agents Scalf, Macys and Harrison. According to Scalf, the plan seemed a workable solution to them. Scalf did not recall any concern about the plan generally; neither did he recall any concern by Macys or Harrison about the intended use of explosives to breach the party walls.

To insure the plan's success, six police posts were set up close to the MOVE compound. These were intended to serve both as

observation points and as positions from which any necessary police fire cover could be provided. In four of these locations -- 6218 Osage, 6232 Osage, 6218 Pine, and 6228 Pine -- armed police officers were stationed on the first and second floors overlooking 6221's front and rear. Two additional rooftop posts were set up and manned at 430 and 432 62nd Street and 6248 and 6250 Osage Avenue.

Earlier portions of this report have discussed in detail the various weapons which were available to the police on May 13th. The arsenal -- much of which was distributed to the six surrounding posts -- included suppressed rifles, M-16's with and without scopes, M-60 machine guns, Browning automatic rifles, Uzis, shotguns, service revolvers, a .50 caliber machine gun, and a .50 caliber scope rifle. Sambor had approved the acquisition of any weapons which could be legally obtained. He explained that he wanted the police to have automatic weapons so that they would have weapons equal or superior to those possessed by MOVE. Marandola, however, told us that he had reservations about Stake Out's possession of special weapons with which they had no familiarity. Griffiths told us that he ordered the removal of the .50 caliber weapon assigned to his post. He did so because the weapon was, in his view, too big and too dangerous.

Although the police were more than adequately provided with special weapons, the command personnel were not so diligent in providing other protective equipment. Marandola told us about the difficulties of dividing the one hundred available sandbags

among the posts and positions where they were needed. There was a plainly inadequate number of sandbags. One officer expressed to us his concern that, in his location, there were only seventeen bags available to protect three men. His problem, however, was far less severe than that faced by the seven men in Post Four who had only twenty sandbags to protect them.

Insertion team members were provided with "protective body armor" (as opposed to "flak jackets") to be worn under their shirts. This equipment saved Connor from serious injury when, while inside 6217, he was shot in the back by a MOVE member during the morning gun battle. Similar protective life vests were not provided to any Fire Department personnel, however. Deputy Fire Chief Walter Miller told us that eight such vests were initially committed for the use of fire fighters who would be in exposed positions during the morning, but that the Police Department later reneged on that promise.

The police operation actually began at daybreak; by then all units and men were in their assigned positions. The Police Commissioner, using an amplification system from inside Post One at 6218 Osage Avenue, advised MOVE of the outstanding warrants and allowed them fifteen minutes to surrender. MOVE did not cooperatively respond. Rather, as LaCon described it, MOVE answered with a string of obscenities and threats:

they told us all that they hoped our insurance was paid up, that we contacted our wives and families because we wouldn't be coming home, if we came in that house, they had something

for us. Another voice got on slightly thereafter and told us that we weren't going to leave the street alive, remember 1978, that we were going to die out there.

A voice on MOVE's loudspeaker also yelled:

You're going to be laying in the street, bleeding in the street. Come on in and get us. We're going to kill you where you stay, where you lay. We see you on the roof. We know you're in those houses.

When the fifteen minute waiting period expired, the plan moved forward. Berghaier was outfitted typically. A gas mask and ear plugs had been supplied. At Powell's suggestion he had Vaseline applied to his face to protect his skin. To prevent gas from seeping under his clothes, he had also taped down his sleeves with duct tape and obtained blousing rubbers for his pants' cuffs.

Although the initial plan called for Team B to enter 6219, by May 13th that strategy had changed as police believed that MOVE had broken into and gained control of 6219. The revised plan directed Team B to enter 6217 and infiltrate 6219 by knocking a hole through the front porch party wall.

Failures in coordination and equipment began even before the insertion teams reached their assigned destinations. As Team B approached 6217 by moving from house to house up Osage Avenue, an improperly directed squirt gun drenched the officers with a steady stream of water. Posts One and Two delivered smoke and tear gas canisters to the front of 6221 to cover Team B's movements. The men manning the posts faced difficulties in providing this support, however, because many of the canisters supplied were so old that they did not function. The situation was described this way:

We would take a shell and bang it on the ground and then shake it until it sounded like a salt shaker. Then we had some idea the shell would fire.

Team A moved to their objective -- 6223 -- through the back alley. Posts Three and Four provided smoke and tear gas cover with their aged canisters. Unfortunately, Team A had not been told that smoke and tear gas would arrive. Halfway up the alley, while exposed to fire from the rear MOVE bunker, the officers in Team A had to stop and put their gas masks on.

Despite the difficulties which the teams faced, both 6217 and 6223 were successfully entered. At or near the time that these entries were accomplished, gunfire broke out. Without question, this initial gunfire emanated from the MOVE compound. Muzzle flashes from the front bunker were seen by many witnesses. Similar muzzle flashes from the rear of 6221 were seen by other witnesses. Marandola also saw a weapon protrude from the base of the bunker and fire at Post Five. At the same time, the Post Five supervisor reported that they were being fired on.

The testimony of the people who saw muzzle flashes was confirmed by other witnesses who testified, without qualification, that they heard the first shots come from the MOVE compound. Other evidence was presented concerning the kinds of weapons which MOVE was then using. Officer Michael Tursi believed that a 12 gauge shotgun was responsible for the first shot and thereafter heard what he believed was .22 caliber gunfire. Sergeant Albert Revel and LaCon similarly told us that the first shot sounded like a shotgun blast, followed by one or more .22 shots. Although

well aware that no automatic weapons were ultimately recovered from the premises, LaCon was convinced, based on the muzzle flashes which he saw from the bunker, that MOVE also fired an automatic weapon.

The police response to MOVE was measured and deliberate. The police plan allowed only a controlled discharge of firearms. Unless in direct danger, no officer was permitted to fire without relaying information about his situation to Marandola through the Stake Out supervisor located in each post. Orders to shoot were given by Marandola in Post One; the majority of the orders to fire during the day were given by Marandola through the respective post commanders.

At least four or five different police positions took direct gunfire before permission to return fire was given. Kirchner estimated that forty or fifty shots were fired by MOVE before any return fire was allowed. In each such instance, specific (rather than general) permission to return fire was given. Positions were allowed to respond only after Marandola was advised of their situation and was satisfied that they were taking fire.

It is difficult if not impossible to describe the specifics of the morning gun battle. Early on, after the insertion teams reported from inside 6217 and 6223 that they were prepared to begin their operations, all Stake Out units were ordered to cease fire to determine whether MOVE was still firing. This was but the first of several lulls between numerous firearms exchanges. There were many points at which Marandola, in order to assess the

situation, would direct all officers to stop shooting unless it was absolutely necessary to protect their lives. All too soon, however, MOVE gunfire would resume.

Many police witnesses stationed in the surrounding posts told us of their experiences that morning. Officer John McDonnell in Post One felt objects come by him which he believed were bullets. Sergeant Griffiths in Post Four reported seeing bullets hit the sandbags and wood window frames at his station. (For safety reasons the window panes had been removed.) One bullet struck the sandbag immediately behind Officer Haworth in Post One; Officer Saxon at Post Seven, at Cobbs Creek Parkway and Osage Avenue, heard bullets ricocheting and told us that at least one bullet struck a vehicle parked at that somewhat removed location. Corporal George Minner, staffing an exposed rooftop post, heard bullets overhead. At times the gunfire from 6221 was so intense that it pinned down his men. Even smoke grenades provided inadequate cover to safely evacuate the rooftop positions. Ultimately, smoke projectiles offered sufficient cover to allow the Fire Department to remove two officers trapped on the roof by MOVE gunfire.

Perhaps the best description of the conditions which prevailed on the morning of May 13th was offered by LaCon. He testified as follows:

A. My recollection, going back, is that approximately ninety minutes after the initial exchange of fire -- I don't mean to imply that there was continuous fire fighting, but what had evolved in that morning period were a series of very short, very intense exchanges

of fire. Fire would break out. We would announce the information to Post 1. We would get the order to return fire. We would do that for ten or fifteen minutes. It would subside. Several minutes would go by and it would begin again.

During one of these exchanges of fire, as near as I can recall, approximately seven-twenty or seven-thirty in the morning, I was struck in the back of the neck by a projectile that passed -- I believe one of those two holes that passed through the scalloped portion of the screen door.

LaCon escaped injury, however. The bullet merely split his protective helmet.

The gunfight eventually ended. Various witnesses estimated that it lasted perhaps 1-1/2 to 2 hours.

The conditions which the men in the insertion teams faced were even more difficult and hazardous. Within minutes of their respective entries it became clear to them and to the command structure that the plan was, in their words, "down the toilet." They nevertheless continued their efforts to accomplish their objectives. This subjected them to great risks. These included, on occasion, heavy gunfire. The difficult circumstances presented were exacerbated by an inadequate communications system. For instance, when the men in the posts returned fire, the lack of communication prevented them from knowing whether they were endangering other officers or placing their shots so as to provide the best possible cover for the insertion team officers under siege.

A full understanding of the nature and significance of the actions of the insertion teams requires some detailed discussion about explosives. Explosives are generally categorized as high or low level. The latter burn; the former instantaneously convert from a solid to a gaseous state, thereby creating much greater energy and force. A shape charge is an explosive device in the form of an inverted "V." This design enables the force of the explosion to be directed and makes it suitable to puncture a barricade. "Jet tappers," a type of shape charge, were used by the insertion teams. These small but high level explosive devices can be used to make a small hole in a wall. Their effect is minimal, however, if the wall is too thick. Moreover, as with any such charge, proper shaping is important, indeed essential, to minimize danger and fragmentation.

The explosives available to and/or used by the teams included HDP boosters (a high explosive), data prime sheets (also a high explosive), data prime boosters (dangerous in grenades; subject to fragmentation), C-4, Tovex, and det (detonation) cord. C-4 detonates at 24,500 feet per second and is appropriately used in shape charges. C-4 is also particularly useful in hostile situations as it will not explode if hit by gunfire. Tovex detonates at 17,000 feet per second. Det cord, which comes in long, rope-like strands, in varying strengths, detonates at 25,000 to 26,000 feet per second. (Its strength is measured in grains per foot; the more grains, the more powerful the explosive.) When used, it

is adhered to cardboard like caulk. Proper shaping is essential, however, otherwise excessive tearing and fragmentation can result.

Our investigation has established, without question, and for the first time, that C-4 was used by both Insertion Team A and Insertion Team B while they were attempting to complete their missions inside 6217 and 6223. The details concerning that usage are best set forth in the context of all of the actions of the teams. We begin with a description of Team B's activities.

Insertion Team B, under the command of Sergeant Edward Connor (a former Bomb Disposal Unit commander on temporary assignment for the May 13th operation), included two Bomb Squad members, Officers Angelucci and Muldowney, and four men from Stake Out, Officers Ryan, Draft, Freer and Marcello. Connor estimated that the team set out for 6217 between 5:45 a.m. and 6:00 a.m. They entered through the front door using a key obtained from the owner and immediately searched the house. As previously noted, the officers entered 6217 because it was believed that MOVE had taken control of 6219. Hence, the team's first objective was to enter 6219 through the adjoining front porch wall. The house's owner had been advised in advance about this aspect of the operation by Connor and assured that the City would cover any damages.

The team's original intent was to remove the adjoining porch wall with sledgehammers. That option did not seem viable or safe, however, considering the amount of gunfire being exchanged by the time they were ready to take action.

The explosives brought into the house by the team included two cardboard charges made with military grade det cord. One prepared charge's purpose was to blow a hole in the party wall between 6215 and 6217 should an emergency escape or evacuation route be needed. The team used the other cardboard hatch charge to open the common porch wall between 6217 and 6219. The four foot oval hatch charge used made a four or five foot hole between 6217 and 6219. It also carried debris across to the 6219/6221 common wall causing some damage to that wall, and contributed to the collapse of the living room ceiling in 6217 which apparently had been weakened by the water pouring into the building from the Fire Department squirt gun.

Before trying to enter 6219's porch through the hole which they had created, Connor threw flash-bangs into 6219. These were intended only to disorient any MOVE members inside the property. Then, as he started forward through the hole, Connor came under heavy gunfire. He saw gun flashes from the top of the 6219/6221 porch wall, apparently from gun ports which had been cut through the wall, and other gun flashes from the floor level. Freer believed that this gunfire from MOVE was coming from the doorway of 6219 or the east corner of 6221. Angelucci said that it looked like it was coming from a baseboard hole between 6219 and 6221, as well as from higher up.

Additional flash-bangs were thrown into 6219 to stop the gunfire but without success. Team members returned fire. Connor, who was spun around and hit forcefully in the back while trying

to retreat to 6217, was dragged into the living room and out of the direct line of fire while "[b]ullets were bouncing all over the place." A .38 caliber bullet was later removed from the back of his "body armor."

The MOVE gunfire assault on Team B continued. Officers in Team B fired back but the shooting from 6221 did not stop. Suppressive fire against 6221's porch did not halt the MOVE attack. Connor concluded that the extreme threat to his team made completion of their mission impossible. He decided that this threat could be eliminated only by removing the 6219/6221 porch wall which gave the MOVE combatants cover. At his direction, a charge containing 1-1/4 pounds of C-4, to be thrown at the wall, was prepared by Angelucci and Muldowney. (Here we detail only our findings with respect to C-4's use on the morning of May 13th. The pertinent facts regarding the various attempts to cover up C-4's use and possession by the Police Department, together with our assessments of the conduct of the officers involved, are extensively set forth in Part XII of this report.) Connor did not obtain permission from Post One to use C-4. Muldowney recalled a conversation between Connor and Marandola authorizing the use of explosives (albeit not C-4) to open up a better view of the fortifications on 6221's porch. There was other testimony, however, that no requests were made by Connor to Post One regarding any such use of explosives.

Although Connor expressed to his men a purported willingness to accept responsibility for C-4's use in the porch wall assault,

he refused to throw the charge himself. Rather, he ordered Muldowney to do this. Muldowney delivered the charge at great personal risk. While doing so he was exposed to gunfire from the waist up; Angelucci provided cover for him with an Uzi.

The first C-4 charge knocked down some of the wall but did not fully accomplish its intended result. There followed but a brief lull, then more MOVE gunfire. Connor called for the preparation of a second charge that was a "bit heavier." Angelucci and Muldowney prepared a second charge. According to their testimony, however, the same amount of C-4 -- a 1-1/4 pound block -- was used in that device. Once again, Connor declined to deliver the charge himself and ordered Muldowney to throw it.

The second charge had more dramatic results and substantially exposed MOVE's porch fortifications. A wooden structure attached to the porch's ceiling could be seen. It appeared to contain small bunkers and rectangularly shaped crawl spaces at the top and bottom. In the top crawl space Angelucci saw what he believed, with "90% to 95% certainty," was a dead body; we believe that this was John Africa. Freer also saw something in this space, but was uncertain whether it was a portion of a body or merely a jacket.

Even the second C-4 detonation did not stop the MOVE attack. Connor reported that firing from the MOVE compound continued. Some shots taken inside 6217 were at floor level, as if they were coming from the 6221 basement level; others appeared to be fired from inside the rear of 6219. The situation was considered a

stalemate. Accordingly, Powell and Team A, who had been waiting inside 6223 for the placement of Connor's charges before acting, were advised through Post One that they would have to proceed alone.

Connor's team remained in 6217 for some time thereafter. A periscope was delivered to Team B to see if 6221 could be attacked by way of the roof. After using this device to reconnoiter the compound through a skylight in 6217, it was determined that MOVE's bunker precluded rooftop access. Team B then left 6217 after another group of officers replaced them to maintain control of the premises.

Team A's efforts inside 6223 were equally if not more unproductive. Lieutenant Frank Powell, head of the Bomb Disposal Unit, was in command. Bomb Disposal Officers Klein and Laarkamp and Stake Out Officers Mellor, Berghaier, D'Ulisse and Mulvihill comprised the remainder of the team. Stake Out Officers Reiber and Graham delivered tear gas to 6223 sometime before 9:00 a.m. and remained inside. Graham also had extensive Bomb Squad experience.

After the team's successful entry into 6223 through the property's rear, the house was searched. Mellor was stationed on the second floor by the house's skylight. Because the skylight hatch was missing, the team members believed that they were vulnerable to attack through that opening.

The explosives brought by Klein into 6223 included three jet tappers and two det cord wall charges, as well as quantities of C-4, det cord, blasting caps and data prima sheets. Klein

said that he intended to make his own shape charge using C-4 if the jet tappers were inadequate to breach the walls. The team's supplies also included flash-bangs.

Immediately after entering 6223 Klein nailed a det cord hatch charge to the living room wall adjoining 6225. The purpose was to permit its immediate detonation, and the creation of a man-sized hole, if the team's emergency evacuation was necessary.

Their operation against the MOVE house began with detonation of a jet tapper in the basement. To avoid injury to individuals on the other side of the wall, this charge was placed high on the wall. Instead of penetrating the basement's stone wall, the jet tapper merely made a 1-1/2 or 2 inch deep hole, dislodged the basement steps, and caused many insects to fall on Klein. Fearing that the house's floor joists might be completely dislodged, and that 6223 might actually collapse as a result, Klein decided not to make a second attempt to breach the basement wall.

Klein and Powell next turned their efforts to penetrating the second floor party wall. At that point Berghaier, Mellor and Laarkamp were also on the second floor. The first jet tapper charge used on the second floor also failed to penetrate the wall. As they were about to try again with their final jet tapper, gunfire erupted from the 6221 side of the bedroom wall. Powell returned fire with his Uzi. The police then sought refuge in a closet. Klein, who could not fit in the closet, stayed in the bedroom and suffered superficial injuries. While inside the

closet, Laarkamp began to hyperventilate; eventually he was evacuated by Berghaier.

Powell reported their situation to Marandola and urged him to direct gunfire at 6221's porch and second floor. At the same time Mulvihill and D'Ulisse, who were downstairs, received gunfire from 6221's porch. They took cover behind a radiator and returned fire.

The various officers on Team A had different opinions about the source of the gunfire which they received at this time. Powell, for example, admitted to the possibility that some shots were police ricochets, but felt strongly that the automatic fire which came through the bedroom wall emanated from MOVE. Klein and Mellor also felt that these shots were fired by MOVE. Mulvihill and D'Ulisse more readily acknowledged the likelihood that "friendly fire" had penetrated 6223. Based on all of the evidence before us we, too, believe that police weapons were the source of most, if not all, of this gunfire.

Powell estimated that he and other team members remained under cover, in the closet, for about twenty minutes. When they emerged, they continued their efforts to breach the second floor party wall using a jet tapper. Eventually they succeeded. By that time, however, the pepper fogger had broken and alternative approaches were necessary. Flash-bangs were thrown through the small opening, again to disorient the occupants, as were six to eight tear gas grenades. Much of the tear gas, however, returned through the hole and clouded the second floor of 6223.

The failure of the second floor efforts led Powell to adopt another strategy. He decided to blow a hole through the 6221/6223 first floor common wall and then create an opening into 6221's basement through which tear gas could be inserted. Powell sought permission from Post One to thus proceed. Marandola, Kirchner and Berghaier all remember Powell saying during this conversation that a low detonation explosive would be used. Marandola said that this was what Sambor had authorized.

The charge used, which was prepared by Graham and Klein, was anything but a low detonation device. It was a 2 by 2-1/2 foot wall shape charge made up of det cord, data sheet and either 1/3 of a pound or 1/3 of a 1-1/4 pound block of C-4. After activating the five minute fuse, Team A left 6223. When it detonated, from 2-1/2 to 3 feet above the floor, it caused very extensive damage. It blew an air conditioner out of 6223 and into the back alley, demolished the porch of 6223, and made 6223 so structurally unsafe that it could not be reentered (despite an attempt by Graham). The explosion also more fully exposed the fortifications on 6221's porch. After the explosion, Officer Tursi, stationed across the street in Post One, could see inside 6221

a log cabin within a house. It would almost be like taking the front wall down and having another wall inside that. It was constructed basically of large timber, trees.

Both Klein and Graham told us that, when detonation occurred, they heard what sounded like two distinct explosions. Graham said that he believed that this was the result of a sympathetic

detonation of a charge which had been set by MOVE inside 6221.

We decline to make any factual finding concerning this hypothesis.

Because this final explosion inside 6223 (which was estimated to have occurred sometime after 9:00 a.m.) made it impossible to safely reenter 6223, Team A evacuated the area. Before leaving, the officers kicked down MOVE's back alley fence. At that time they heard children's voices in the basement; until that point they had been unaware that children were present. The officers then considered inserting tear gas through a pipe protruding from the basement area of the compound. This was rejected, however, for fear of harming the children and because at least one rifle was spotted protruding from the rear of 6221. Accordingly, the team left the alley and proceeded to Cobbs Creek Parkway.

We have considered whether any of the previously described police actions merit criminal charges. Charges which arguably could apply to these above described actions include murder, manslaughter, aggravated assault, risking catastrophe, and recklessly endangering another person. Significantly, however, we have found that all of the assaultive police conduct began only after MOVE fired at police. Furthermore, the police actions were all directed toward the goal of executing judicially approved arrest and search warrants.

Section 508 of the Crimes Code specifically authorizes the use of deadly force by police where, as here, they are attempting to make an arrest and a forcible felony has been committed or

human life is endangered. The only question for us to consider, therefore, is whether the force used by police was excessive and unjustified. We address separately each of the morning assaults on the MOVE compound.

First, we consider the police gunfire directed at 6221 Osage Avenue. The sheer number of rounds directed at the compound, with the children inside, led a majority of the MOVE Commission to term police gunfire "unconscionable" (Findings and Conclusions, No. 18). This finding is inappropriate given the well-considered gunfire control plan devised by the police to minimize danger to anyone other than the armed resisters. The firing of so many bullets, while unnecessary and dangerous, was not so excessive as to mandate criminal liability.

The designers of the operation had developed a contingency plan in case, as actually occurred, MOVE responded to the surrender order with gunfire. Police could not initiate any firing and, moreover, could fire back only with express approval from Marandola unless an officer's life was in imminent danger. Even after gaining approval from Marandola, an officer could only fire at combatants who were actually firing at the police. Police adhered to these instructions, firing only in response to MOVE gunshots directed at the insertion teams or posts, and aiming only at MOVE gun positions. Thus, when Ramona Africa became visible in the front of the compound during the afternoon, Marandola ordered police to hold their fire because she was not then shooting at police.

The only flaw in this fire control procedure was the absence of a mechanism to stop the gunfire beyond Marandola's intermittent cease fire orders. The MOVE Commission found that police fired over 10,000 rounds at the MOVE compound (Findings and Conclusions, No. 18). This number is erroneous. Unquestionably, police checked 9,400 rounds of ammunition out of the pistol range that were not returned and borrowed ammunition from other sources. That amount, however, is not reflective of how many rounds were fired by police as it includes large amounts of unfired ammunition which exploded after being abandoned in the police posts which caught fire. For example, Marandola alone abandoned 1,000 rounds of M-16 ammunition when he evacuated Post One.

Based on the evidence before us, the police probably fired far too many rounds. Further, some of these rounds apparently "overpenetrated," going through the front of 6221 Osage Avenue, passing through a side wall, and just missing officers on one of the insertion teams. Only luck saved police officers from being killed by "friendly fire." The sheer number of rounds, however, does not make this police action criminal. The fact remains that gunfire was directed only at combatants and only while they fired on police. The number of bullets does not change the nature of the conduct: All police gunfire was a justified response to MOVE gunfire. Thus, while the use of so many rounds may have been unnecessary, it was not unlawful.

Our next consideration is the use of explosive charges by the insertion teams. As is apparent in the evidence discussed

above, the charges were used for two purposes: (1) to gain entry to 6221 Osage Avenue; and (2) to stop gunfire from fortified positions inside the MOVE compound. The police involved clearly had insufficient experience to perform either of these tasks with explosives. While their use of explosives was ill advised, however, it does not warrant criminal charges.

The devices used to gain entry to the MOVE compound ranged from small jet tappers to Klein and Graham's use of a C-4/data sheet combination. The purpose of all of these charges was to cut holes in the MOVE fortifications to allow the introduction of water and tear gas. These uses of force were measured attempts to open the MOVE compound without causing injury to anyone inside.

As there was no intent to harm anyone inside the house, we have considered whether any crimes of recklessness occurred, particularly because explosives were used against a house in which gasoline was presumably stored. The applicable crimes are risking catastrophe and recklessly endangering another person. Under these sections, the police would be liable only if they consciously disregarded a substantial risk that their conduct could cause injury to non-combatants. (As is discussed below, police had no obligation to avoid harming MOVE members who were firing at police.) Two factors rule out prosecution for these crimes. First, the explosives used were selected and shaped to knock holes in the walls of 6221 Osage Avenue and cause minimal risk of fire or injury on the other side. Second, any gasoline inside the house was believed to be in the basement. The only explosive used against

the basement walls was a small jet tapper. Thus, it is apparent that police did not disregard a substantial risk of harm but rather recognized the risk and took steps to minimize it. Many of the explosives used were so weak that they failed to breach the MOVE fortifications. It also appears that none of the charges used to enter the MOVE compound caused any injury to anyone inside. No indictment for criminal conduct is merited for the use of explosives to attempt entry to 6221 Osage Avenue.

The explosives used to stop gunfire from inside the compound are of a different nature. While these charges were also intended to destroy MOVE fortifications, specifically the front porch bunker, they were not designed to insure the safety of those behind the barricade. As this force was only used against MOVE combatants, however, this police conduct was justified under §508.

When the first hatch charge opened the porch between 6217 and 6219 Osage Avenue, police fairly believed that MOVE had broken through the wall between 6221 and 6219 Osage Avenue. Police then threw flash-bangs into 6219. These explosives, made of HDP boosters, were intended merely to disorient MOVE members with sudden bright light and loud noise so that police could advance into 6219. James Phelan, a demolitions expert, testified that HDP boosters are powerful explosives and are far too dangerous a substance to use in flash-bangs. Despite the inappropriateness of their employment, however, the boosters had been tested and found harmless. Further, no injury resulted from their use. Hence,

rather than giving rise to criminal charges, this conduct only demonstrates the inexperience of the police in using explosives.

Unfortunately, the hole in the party wall between 6217 and 6219 created a direct line of fire between the front porch bunker in 6221 and the police position in 6217. MOVE took advantage of this, firing many shots and hitting one officer in the back. Further, police were vulnerable to attack from 6219. Hence, at Connor's direction, one block of C-4 was thrown at the 6219/6221 porch wall to destroy the covering wall and reveal MOVE's gun positions. When the firing did not stop, a second block was thrown. One of the combatants, presumably John Africa, was apparently killed by the second explosion.

This use of deadly force by the police was justified under §508. While police had been attempting to execute valid arrest warrants, MOVE combatants had committed various forcible felonies, including shooting an officer. Gunfire continued from behind MOVE fortifications. Under these circumstances, response with deadly force was warranted and not criminal.

The only remaining question is whether response with blocks of C-4 was so excessive as to require prosecution. At the time that the C-4 was used, police firearms had failed to stop the gunfire from the MOVE compound. Service of the warrants and protection of the police mandated removal of the massive fortifications inside 6221 Osage Avenue. Use of C-4 to accomplish this goal cannot be deemed criminally excessive as this force was applied only against combatants. Indeed, even a block of C-4 was

insufficient to fully breach the porch bunker fortifications and a second block had to be used. Thus, §508 remains applicable and no charges are merited.

In sum, it appears that the large number of rounds fired by police may have been an unnecessary exercise of force. Further, it is very clear that police did not have the proper training to use explosives as offensive weapons. Neither did the Police Department have in place adequate procedures with respect to the use of explosives. Accordingly, if it has not already been done, we recommend that the Department adopt strict procedures governing the use of offensive explosives, which include a written proposal for each use which must be approved by the highest levels of the Police and Fire Departments and the City Administration.

It must be noted, however, that police used deadly force only against those who had fired at them and employed limited explosives in all other situations. Given the relentless gunfire from MOVE members and the massive fortifications inside the compound, the degrees of force used against MOVE combatants do not warrant criminal charges.